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In the Supreme Court of the United States

OCTOBER TERM, 1991

WARD H. FEITT, PETITIONER

v.

OFFICE OF THRIFT SUPERVISION,
DEPARTMENT OF TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. 1818(i), deprives the district courts of jurisdiction to enjoin administrative enforcement proceedings pending before the Office of Thrift Supervision.

2. Whether the FIRREA provisions authorizing the Office of Thrift Supervision to bring administrative enforcement actions deprive petitioner of his right to a jury trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) and the order of the district court (Pet. App. 31a-32a) are unreported.

JURISDICTION

The court of appeals entered its judgment on November 14, 1991. It denied petitioner's request for a rehearing on December 27, 1991. Pet. App. 13a-14a. It denied a petition for rehearing by the Director of the Office of Thrift Supervision (OTS) on January 14, 1992. Pet. App. 15a-16a. The petition for a writ of certiorari was filed on April 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Until October 1990, petitioner served as president, managing officer, and a director of Grandview Savings Association, a federally insured savings association. Pet. App. 2a. On January 3, 1991, OTS filed a Notice of Charges against petitioner alleging violations of the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*, as amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. The Notice of Charges alleged that in 1989, federal and state regulators examined Grandview's records and learned that Grandview spent five times more than comparable institutions for employees' expenses, most of which were attributable to petitioner. Pet. App. 3a. The Notice of Charges further alleged that despite the regulators' criticism in a prior examination report of Grandview's inadequate business expense records, petitioner was unable to document business purposes for substantial payments by Grandview, including expenditures for petitioner's personal benefit. *Ibid.* The Notice of Charges sought restitution and reimbursement from petitioner for these payments.

Also on January 3, 1991, OTS issued a temporary cease-and-desist order against petitioner to ensure that he would not dissipate his assets during the enforcement action. Pet. App. 3a.[1] The

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[1] One of FIRREA's original provisions authorized OTS and the other federal banking agencies to issue temporary cease-and-desist orders requiring affirmative action to prevent dissipation of assets pending administrative proceedings. 12 U.S.C. 1818(c)(1) (Supp. I 1989). That provision was amended by Section 2596 of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4908. The 1990 amendment clarified that banking agencies have authority to enter temporary cease-and-

order required petitioner to submit a certified financial statement and state and federal income tax returns for 1988 and 1989, and it prohibited petitioner from selling, transferring, or encumbering his assets without giving OTS prior notice. Pet. 6. The order also required petitioner to post security in the amount of $469,639 by either paying cash to Grandview, establishing and maintaining an escrow account, or furnishing an irrevocable letter of credit or fidelity bond. See Pet. 5.[2]

2. Petitioner brought suit in the United States District Court for the Western District of Pennsylvania seeking a declaratory judgment and a preliminary injunction prohibiting OTS from proceeding with its enforcement action against him. He alleged, among other things, that FIRREA was unconstitutional as applied to him because it denied him his right to a jury trial on OTS's claims for restitution and reimbursement. The district court determined that it had jurisdiction over petitioner's claims under 28 U.S.C. 1331. Pet. App. 18a-19a. It then denied petitioner's request for injunctive and declaratory relief, holding that petitioner had not established irreparable injury or a likelihood of success on the merits.. *Id.* at 28a-30a. In addition, the court granted OTS's

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desist orders requiring restitution and reimbursement under 12 U.S.C. 1818(b)(6)(A) (Supp. I 1989), including orders to remedy harm that has occurred, as well as orders to prevent future harm. See 136 Cong. Rec. S17599 (daily ed. Oct. 27, 1990) (statement of Sen. Riegle); see also *Spiegel* v. *Ryan*, 946 F.2d 1435, 1438-1439 (9th Cir. 1991), cert. denied, 112 S. Ct. 1584 (1992).

[2] The $469,639 bond requirement reflected $428,298 that OTS sought in restitution and interest, Pet. App. 3a, plus an additional amount for attorney's fees.

petition for summary enforcement of the temporary cease-and-desist order. *Id.* at 29a.

3. In an unpublished opinion, the Third Circuit reversed the district court's ruling on the jurisdictional issue. The court of appeals rejected the district court's reliance on 28 U.S.C. 1331 as a basis for jurisdiction over petitioner's claims, and held that 12 U.S.C. 1818(i)(1) precluded review of those claims "unless they fell within one of the specific exceptions contained elsewhere in § 1818." Pet. App. 6a.[3] The court of appeals explained that "Section 1818 does provide individuals such as [petitioner] with means to challenge the actions of banking agencies, but those means are specific and limited." *Ibid.* In particular, the court determined, "[petitioner's] attempt to enjoin the OTS proceedings against him is precisely the type of interference with regulatory action that § 1818 was intended to foreclose." *Id.* at 9a. The court further determined that, although petitioner was entitled to challenge the bond requirement in the temporary cease-and-desist order under Section 1818 (c)(2), that challenge had become moot.[4] The court

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[3] 12 U.S.C. 1818(i)(1) provides in relevant part:

> [E]xcept as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

[4] In the court of appeals' view, petitioner's challenge to the bond requirement became moot because OTS did not appeal from the district court order denying OTS's motion to hold petitioner in contempt for failing to post the bond. Pet. App. 11a-12a. At the same time, the court of appeals recognized that in the future OTS is free to seek further relief from the district court in connection with the enforcement action. *Id.* at 11a.

accordingly reversed and remanded with instructions to dismiss petitioner's challenge to the enforcement action for lack of jurisdiction. Pet. App. 12a.[5]

ARGUMENT

1. The court of appeals held that the district court lacked jurisdiction over petitioner's challenge to the administrative proceeding pending before OTS. Petitioner does not contest that holding. Instead, he incorrectly suggests that the court of appeals' decision was based on the judicial doctrine requiring exhaustion of administrative remedies. Pet. 24. The court of appeals did not apply the exhaustion doctrine. The basis of the court of appeals' refusal to hear petitioner's claims was its holding that 12 U.S.C. 1818(i)(1) prohibited judicial review of those claims at this stage. Because petitioner does not take issue with that holding, review by this Court is not warranted.

2. In any event, the court of appeals correctly concluded that 12 U.S.C. 1818(i)(1) deprived the district court of jurisdiction over petitioner's challenge to the ongoing administrative proceeding. That conclusion was compelled by this Court's recent decision in *Board of Governors* v. *MCorp Financial, Inc.*, 112 S. Ct. 459 (1991).

In *MCorp*, this Court relied on the "plain, preclusive language" of 12 U.S.C. 1818(i)(1) to hold that a district court lacked jurisdiction to enjoin administrative proceedings commenced by the Board of Governors of the Federal Reserve System. 112 S. Ct. at 463; see also *id.* at 463-465. MCorp had argued that

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[5] The court of appeals upheld the district court's conclusion that it had jurisdiction over OTS's petition for summary enforcement of the cease-and-desist order. Pet. App. 5a. That holding is not before this Court.

injunctive relief was authorized under the automatic stay provision of the Bankruptcy Code, 11 U.S.C. 362, and the provision permitting bankruptcy courts to exercise concurrent jurisdiction over certain civil proceedings, 28 U.S.C. 1334(b). *MCorp*, 112 S. Ct. at 463. In rejecting that argument, this Court concluded that "the specific preclusive language in 12 U.S.C. § 1818(i)(1)" was not "qualified or superseded" by the bankruptcy provisions upon which MCorp relied. *MCorp*, 112 S. Ct. at 465.

The Court in *MCorp* likewise rejected the court of appeals' reliance on *Leedom* v. *Kyne*, 358 U.S. 184 (1958), as a basis for judicial review. *MCorp*, 112 S. Ct. at 465-466. The Court distinguished *Leedom* on two grounds. First, unlike the party seeking relief in *Leedom*, MCorp had a "meaningful and adequate opportunity for judicial review" after the Board entered a final order. *MCorp*, 112 S. Ct. at 466. Second, in contrast to the statute at issue in *Leedom*, Section 1818(i)(1) "provides * * * clear and convincing evidence that Congress intended to deny the District Court jurisdiction to review and enjoin the Board's ongoing administrative proceedings." *MCorp*, 112 S. Ct. at 466.

The present case is controlled by *MCorp*. The "specific preclusive language" of Section 1818(i)(1) is not "qualified or superseded" by the federal question statute, 28 U.S.C. 1331, any more than it is qualified or superseded by the bankruptcy provisions at issue in *MCorp*, 112 S. Ct. at 465. As the court of appeals correctly recognized, petitioner's attempt to enjoin OTS's ongoing enforcement action "is precisely the type of interference with regulatory action that § 1818 was intended to foreclose." Pet. App. 9a. Moreover, petitioner has not been deprived of a meaningful opportunity for judicial review. As the court of

appeals observed, "[i]f a permanent cease and desist order is ultimately entered against [petitioner], he will have an opportunity to raise [his] arguments on a direct appeal to a court of appeals pursuant to [12 U.S.C.] § 1818(h)(2), and if no order is ultimately entered, he will have no cause for complaint." Pet. App. 9a-10a.[6]

3. Having correctly decided the jurisdictional issue, the court of appeals properly declined to address petitioner's contention that FIRREA deprived him of his Seventh Amendment right to a jury trial. Cf. *MCorp*, 112 S. Ct. at 461 (declining to reach MCorp's challenge to the Federal Reserve Board's "source of strength" regulation in light of conclusion that district court lacked jurisdiction over MCorp's

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[6] Although at the time of its decision the court of appeals did not have the benefit of this Court's opinion in *MCorp*, the court of appeals' decision was fully in accord with lower court precedent. See *Abercrombie* v. *Office of Comptroller of Currency*, 833 F.2d 672, 677 (7th Cir. 1987) ("In § 1818(i)(1), Congress has expressly and unequivocally deprived the district courts of jurisdiction over [civil money penalty] assessments by the Comptroller under § 1818(i)(2)(i)."), cert. denied, 112 S. Ct. 52 (1991); *Investment Co. Inst.* v. *FDIC*, 728 F.2d 518, 524-525 (D.C. Cir. 1984); *First Nat'l Bank* v. *Conover*, 715 F.2d 234, 236 (6th Cir. 1983); *Groos Nat'l Bank* v. *Comptroller of Currency*, 573 F.2d 889, 895 (5th Cir. 1978) (affirming district court's dismissal of declaratory judgment action because "this regulatory process is not to be disturbed by untimely judicial intervention."); *In re American Continental Corp./Lincoln Savings & Loan Securities Litigation*, 779 F. Supp. 1053 (D. Ariz. 1991) (refusing to enjoin a pending OTS enforcement proceeding); *FirstCorp., Inc.* v. *Office of Thrift Supervision*, 129 Bankr. 450 (E.D.N.C. 1991); *Lincoln Savings Bank* v. *Unicorp Energy Corp.*, No. 91 Civ. 7370 (S.D.N.Y. Jan. 15, 1992); *Paul* v. *Office of Thrift Supervision*, No. 91-2082-Civ. (S.D. Fla. Mar. 31, 1992), appeal pending, No. 92-6097 (2d Cir.).

challenge). Petitioner's contention, in any event, is without merit, for two reasons.

a. First, this Court has long held that Congress may assign the adjudication of cases involving public rights to an administrative agency that does not conduct jury trials. See *Granfinanciera S.A.* v. *Nordberg*, 492 U.S. 33, 52 (1989); *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450-461 (1977); *Pernell* v. *Southall Realty*, 416 U.S. 363, 382-383 (1974); *Block* v. *Hirsh*, 256 U.S. 135, 158 (1921); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

This case—involving a federal agency's efforts to discharge its regulatory enforcement responsibilities —plainly concerns public rights. Banking "is one of the longest regulated and most closely supervised of public callings." *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947). Congress has provided OTS and the other banking agencies with broad authority to bring enforcement actions seeking restitution against directors, officers, employees and other "institution-affiliated part[ies]" who have violated their fiduciary duties and caused more than a minimal loss to their employers or principals. 12 U.S.C. 1813(u) (Supp. I 1989), 1818(b), 1818(i)(3) (Supp. I 1989). In this case, OTS has alleged that petitioner caused a federally insured institution to make substantial expenditures for his personal benefit. It is clear that this proceeding was filed to enforce public rights created by Congress and thus does not raise any viable Seventh Amendment claims. See *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932) (a public right is one "aris[ing] between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"); *Granfinanciera*, 492 U.S. at 51 (public

rights are created where the government is acting in its sovereign capacity under an otherwise valid statute).[7]

b. Second, OTS's proceeding sought restitution of amounts wrongfully paid to petitioner. At common law, such relief was considered equitable in nature, and accordingly would not give rise to a right to a jury trial under the Seventh Amendment. Cf. *Woodell* v. *International Bhd. of Elec. Workers*, 112 S. Ct. 494, 498 (1991); *Chauffeurs Local No. 391* v. *Terry*, 494 U.S. 558, 570 (1990); *Tull* v. *United States*, 481 U.S. 412, 424 (1987).

[7] Petitioner suggests that the potential expense of defending against administrative charges required the lower courts to review his Seventh Amendment claim at this stage, notwithstanding the limitations on judicial review set forth in Section 1818(i)(1). Pet. 10. This Court rejected a similar contention in *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244 (1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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